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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

F. W. WOOLWORTH CO.,

Petitioner,

vs.

GERALD FELL, CLIFFORD KENDRICKS and ERNEST TURNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented

1. Whether this Court's decisions in *Hines* v. *Anchor Freight, Inc.*, 424 U.S. 554 (1976), *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), bar individual employees, who were adequately represented by their exclusive bargaining representative in an arbitration proceeding and who do not even allege unfair representation by their union, from intervening after judgment in a district court action between their employer and union and appealing from a district court judgment against the union vacating the arbitration award and from which their union chose not to appeal.

2. Whether this Court's decision in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), permits an arbitrator, in determining whether an employee's termination was for "just cause," to substitute his personal judgment as to circumstances mitigating an employee discharge penalty when he has made a factual finding that the employee violated a Company rule and the parties' collective bargaining agreement expressly provides that violation of *any* Company rule, without exclusion, shall constitute just cause for discharge.

Parties to the Proceeding

Plaintiff-Appellee-Petitioner:

F. W. Woolworth Co.*

Defendant:

Miscellaneous Warehousemen's Union, Local No. 781, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America**

Applicants for Intervention-Appellants-Respondents:

Gerald Fell, Clifford Kendricks and Ernest Turner

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* Pursuant to Rule 28.1 of the Rules of the Court, petitioner states that it has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

** The Union was a defendant in the district court proceedings; however, it did not appear and was not a party before the court of appeals.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, F. W. Woolworth Co. (hereinafter referred to as the "Company"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in these proceedings.

Opinions Below

The opinion of the court of appeals reversing the judgment of the district court is reported at 629 F.2d 1204

(7th Cir. 1980). It appears in Appendix A to this petition.

The decision of the district court vacating the arbitration award is not reported. It appears in Appendix B to this petition. The opinion and award of arbitrator Albert A. Epstein is not reported. It appears in Appendix G to this petition.

Statement of Jurisdiction

The judgment of the court of appeals was entered on August 7, 1980 (Appendix E), and certified and issued in lieu of a formal mandate on November 13, 1980.

A timely petition for rehearing and suggestion of rehearing *en banc* was filed. Pursuant thereto, a vote of the eight active members of the court of appeals was requested. Four members of the court of appeals voted to grant the petition; however, as this constituted less than a majority, the petition was denied on October 31, 1980 (Appendix F). This petition is filed within 90 days of said Order.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statute Involved

The following statutory provision is involved in this case:

> Section 301(a) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. §185, which reads:
>
> "(a) Suits for violation of contracts between an employer and a labor organization representing em-

ployees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

A. Procedural history.

This cause arises out of an arbitration between the Company and the Miscellaneous Warehousemen's Union, Local 781, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the "Union"). The issue submitted to arbitration was whether the Company had just cause for its discharge of respondents Gerald Fell, Clifford Kendricks, and Ernest Turner (hereinafter sometimes referred to collectively as the "employees") under the terms of its collctive bargaining agreement with the Union. The arbitrator held that the employees had violated a Company rule, as contended by the Company, but mitigated the discharge penalty to disciplinary suspensions.

Pursuant to §301 of the Labor Management Relations Act, 1947, 29 U.S.C. §185 (hereinafter referred to as the "Act"), the Company instituted an action to vacate the arbitrator's award by filing a complaint against the Union in the United States District Court for the Northern District of Illinois. The employees were not parties to that action.

On cross-motions for summary judgment, the district court, on June 7, 1979, held that the arbitrator had exceeded his authority under the collective bargaining agree-

ment and entered judgment in favor of the Company vacating his award (Appendices B and C).

On June 22, 1979, after entry of judgment, employee Fell moved to intervene in the district court and requested reconsideration of its decision. Thereafter, on July 6, 1979, employees Turner and Kendricks also moved to intervene. On July 13, 1979, the district court denied the motions for intervention and reconsideration (Appendix D).

The employees then filed a notice of appeal from both the June 18, 1979 judgment on the merits and the July 13, 1979 order denying intervention and reconsideration. The Union did not appeal from the district court's judgment and did not enter an appearance in the proceedings before the court of appeals. The Company's motion to dismiss the appeal was denied on October 10, 1979.

A three-judge panel of the United States Court of Appeals for the Seventh Circuit, Judge Bauer dissenting, held, in an opinion filed August 7, 1980, (1) that this Court's decisions in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 630 (1965), do not bar these employees from individually enforcing the collective bargaining agreement between the Union and the Company, and (2) that the district court erred in vacating the arbitration award (Appendix A). On August 7, 1980, judgment was entered in accordance with the opinion (Appendix E).

On August 20, 1980, the Company filed a timely motion for reconsideration and suggestion for rehearing *en banc*. Both motions were denied, four of eight active members of the court of appeals having voted in favor of rehearing *en banc* (Appendix F).

On November 13, 1980, a certified copy of the judgment was issued in lieu of a formal mandate.

B. Facts.

Each of the employees was discharged for violating Company Rule 10,[1] pertaining to attendance. The Union filed grievances protesting the terminations under the collective bargaining agreement between the Company and Union.

The collective bargaining agreement provides for a single, exclusive method of enforcement: arbitration between the Union and the Company. It designates the Union as the "sole and exclusive bargaining agent," and mandates that "[a]ny dispute arising out of or under the provisions of this agreement shall be disposed of" according to a detailed grievance and arbitration procedure set forth therein. That procedure consists of several steps, culminating, if necessary, in the submission of the dispute to arbitration for a decision "binding upon the parties to this agreement [the Union and the Company], both of whom agree to expedite this arbitration and share expenses equally." (Appendix H, at pp. 53-54). The Union's exclusive authority to process grievances on behalf of employees it represents is affirmed by its By-Laws, which provide that the Union has sole discretion to determine the extent to which it will pursue a particular grievance.[2]

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[1] Company Rule 10 provides as follows: "When an employee is absent from work, he *shall* notify the Company at the earliest possible time, giving reason for such absence, and keep the Company advised daily as to the probable date of return to work. Excessive absenteeism is cause for discharge." (Appendix G, at p. 44).

[2] Article X, Section 5 of the Union's By-Laws, quoted by Judge Bauer of the Seventh Circuit in his dissenting Opinion (Appendix A, at pp. 24-25), provides:

(Footnote continued on following page)

The dispute submitted to the arbitrator was whether the Company had "just cause" for its discharge of the employees. The only restriction in the collective bargaining agreement on the Company's right to terminate employees is found in Article X thereof, which provides:

> "*Article X. Discharge*
>
> "No employee shall be discharged except for just cause. *Violation of any Company rule shall be considered a just cause.* Any dispute with respect to justification for a discharge of any employee shall be considered a grievance and subject to the grievance and arbitration machinery provided in this agreement. The term 'just cause' shall not be limited solely to violation of Company rules." (Emphasis added; Appendix H, at p. 53)

Thus, the contract clause requiring "just cause" for discharges also mandates that violation of *any* Company rule shall be considereed a just cause.

(Footnote continued from preceding page)

> "(B) Every member by virtue of his membership in this Local Union authorizes this Local Union to act as his exclusive bargaining representative with full and exclusive power to execute agreements with his employer governing terms and conditions of employment and to act for him and have final authority in presenting, processing and adjusting any grievance, difficulty or dispute arising under any collective bargaining agreement or out of his employment with such employer, in such manner as the Local Union or its officers deem to be in the best interests of the Local Union. The Local Union and its officers, business representatives and agents may decline to process any such grievance, complaint, difficulty or dispute, if in their sole discretion and judgment, such grievance, complaint or dispute lacks merit."

The arbitrator appointed pursuant to this agreement found that Company Rule 10 was not unreasonable and that all three employees had violated the Rule, as amended by the parties' practice.[3] He refused, however, to uphold the discharges, despite the collective bargaining agreement's definition of "just cause for discharge" as violation of *any* Company rule, stating:

> "I find that the grievants did violate the Company's rule, but the nature of the violation, considering the circumstances set forth above, does not justify discharge. In accordance with my findings, the grievants are found to be in violation of the Company's rule in varying degrees and, therefore, subject to varying penalty, but discharge is not the appropriate penalty in the instant case." (Appendix G, at p. 51).

The arbitrator then held that disciplinary suspensions were appropriate for each of the employees, 30 days for employee Turner, and 90 days each for employees Fell and Kendricks.

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[3] The arbitrator found that Company Rule 10 had been in existence for over 20 years, but that the daily "call-in" requirement had been enforced on a three-day basis, *i.e.*, employees were required to "call-in" every three days. He also held that, as a matter of practice, the Company has maintained that a person who fails to report for three days is subject to discharge, and that the Company has discharged a number of employees on that basis. He did not find any instances of application of a lesser penalty for violation of this Rule. (Appendix G, at pp. 44, 47, 49).

REASONS FOR GRANTING THE WRIT

I

The question of individual employees' standing to intervene and to enforce an arbitration award between the Union and the Company under a labor agreement to which the employees were not parties presents an important question of federal law which has been decided by the court below in a manner which conflicts with applicable decisions of this Court and with a decision of the Fifth Circuit.

Petitioner respectfully submits that the majority decision of the Seventh Circuit is in conflict with the rule established by this Court in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), and with the decision of the United States Court of Appeals for the Fifth Circuit in *Acuff* v. *United Paper Makers & Paper Workers, AFL-CIO,* 404 F.2d 169 (5th Cir. 1968), cert. denied, 394 U.S. 987 (1969).

The question of who may enforce a collective bargaining agreement has been considered by this Court in a variety of contexts and cases. It is now well settled that when a collective bargaining agreement provides for an exclusive method of enforcement to be invoked by either the union or management, individual employees have no right of enforcement absent a breach of duty of fair representation by the union or a repudiation of the contractual enforcement procedure by their employer. *See, e.g., Republic Steel Corp.* v. *Maddox, supra* (holding that an individual employee could not ignore contractual grievance and arbitration procedures and commence suit for a breach of a labor agreement); *Vaca* v. *Sipes, supra* (holding that

an employee does not have standing to sue his employer for breach of contract unless and until he alleges and proves his union breached its duty of fair representation by not pressing his claim to arbitration); and *Hines* v. *Anchor Motor Freight, Inc., supra* (holding that employees' allegations of breach of duty of fair representation gave them standing to seek vacation of an arbitration award, but that proof of such a breach would be prerequisite to a recovery for a breach of contract). The Seventh Circuit in the case at bar establishes a new—and, it is submitted, unwarranted—exception to the rule established by these cases.

Until the Seventh Circuit decision herein, this strict rule of preclusion of individual action was held to apply whether the issue concerned the submission of a dispute to arbitration, as in *Vaca,* the method of preparation for arbitration, as in *Hines,* or the taking of an appeal from a district court decision, as in *Acuff*, and the case at bar. As stated succinctly by the Fifth Circuit in *Harris* v. *Chemical Leaman Tank Lines, Inc.,* 437 F.2d 167, 170 (5th Cir. 1971):

> "Where responsibility for processing disputes under a labor agreement is vested solely in the union, the employee must rely upon the union to exhaust contractual remedies in his behalf, and to enforce compliance with those remedies by the employer."

The majority opinion of the Seventh Circuit purports to distinguish the above cases. However, the individual employees' attempt to enforce the collective bargaining agreement in the case at bar is not distinguishable; thus, the majority decision herein does not construe the rule of this Court, but, rather, creates a new and unintended exception to that rule. In so doing, it is in direct conflict

with *Acuff*, where it was held that individual employees not alleging unfair representation lacked standing to intervene in a district court action between their employer and union.

The Seventh Circuit's discussion of standing recognizes that the contract herein requires dispute resolution through arbitration between the Union and the Company.[4] However, it holds the rule of *Vaca, Maddox* and *Hines* inapplicable because: (1) the employees here seek to uphold an arbitration award, not to vacate it; (2) the Union has not actively opposed the appeal; and (3) the employees seek to avoid a Union decision not to appeal, rather than

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[4] Even prior to this Court's decision in *Vaca*, courts had held that an individual employee lacks standing to enforce a labor agreement between his employer and union. See *Local Union No. 12405, District 50, United Mine Workers* v. *Martin Marietta Corp.*, 328 F.2d 945 (7th Cir. 1964), cert. denied, 397 U.S. 880 (1964); *Proctor & Gamble Independent Union* v. *Proctor & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962), cert. denied, 382 U.S. 826 (1965), and cases cited herein, holding that individual employees cannot compel arbitration under labor agreements to which they are not parties. Individual employees also have been held not to be indispensible parties, within the meaning of Fed.R.Civ.P. 19, to actions between employers and unions to enforce labor contracts. *See, e.g., Fibreboard Paper Products Corp.* v. *East Bay Union of Machinists, Local 1304*, 344 F.2d 300 (9th Cir. 1965), cert. denied, 382 U.S. 826 (1965).

The Seventh Circuit majority agree that the contract herein, like those in *Vaca, Hines,* and *Maddox*, requires dispute resolution through arbitration which may be invoked only by the Union or the Company. They further recognize that, pursuant to *Vaca*, "the union (in contrast to the individual employees) is in control of the collective bargaining process and may, in the exercise of good faith and sound discretion, take employee grievances to various steps of the grievance procedure, including the ultimate step of arbitration, so long as it does not violate its statutory duty of fair representation" (Appendix A, at p. 9).

a Union decision not to arbitrate. It is submitted that none of these factors presents a valid basis for distinction, and that the exception created thereby is both illogical and contrary to federal labor policy.

The Seventh Circuit's distinction of this case on the ground that the employees sought to uphold, rather than vacate, an award limits *Vaca* to cases where a union stops short of arbitration, and *Hines* and *Acuff* to cases where a union is unsuccessful in arbitration. There is no suggestion in those decisions that such a limitation was intended by this Court and no reasonable basis exists for creating one.

Under the Seventh Circuit's rationale, if a union loses an employee's case in arbitration, the employee lacks standing to pursue his claim individually; however, should the union win an arbitration, the employee immediately gains individual standing to defend the award *ad infinitum*, Thus, it appears that had the Union failed to oppose the Company's action to vacate the award in the district court in the first instance, the majority would hold the individual employees entitled to intervene at that point to conduct the litigation. Yet, there is no logical reason for stopping there. Had the Union appealed unsuccessfully to the court of appeals, this same logic would permit the individual employees to intervene and petition for rehearing by the court of appeals and then to petition this Court for a writ of certiorari to review the decision of the court of appeals. In short, if a union prevails before an arbitrator, it must thereafter look over its shoulder at the individual employees, who may individually usurp its representative function should it stop at any point short of a final and unreviewable determination by this Court.

The want of logic in the reasoning of the court of appeals is apparent from even a cursory analysis of a fact situa-

tion slightly different from that involved here. Thus, had the arbitrator in this case decided one employee's grievance in favor of the Company and the other two in favor of the Union, and the district court vacated that portion of the award favorable to the Union, the employee whose claim had been lost in arbitration would not have standing to intervene and appeal under the Seventh Circuit decision. However, the two whose claims had been successfully presented in arbitration would have standing to appeal, although all three employees would be in precisely the same situation as to both the Company and the Union. It is particularly ironic that, under this rationale, the more successful a union is and the further it proceeds with an employee's grievance, the less control it has to end the grievance process without individual usurpation of its authority.

The Seventh Circuit majority's second basis for excepting this case from the general rule—lack of active Union opposition—is similarly lacking in judicial precedent. There is no suggestion in *Vaca* or *Hines* that individual enforcement actions are prohibited only when a union actively opposes them, and it would appear from the opinion in *Maddox* that the union took no affirmative position with respect to its member's individual claim. Also, contrary to the majority's suggestion, nothing in the Fifth Circuit's opinion in *Acuff* indicates that the union there opposed intervention or the employees' contentions; certainly, if there was union opposition, it was not considered by that court in reaching its conclusion.

Further, the rationale for limiting individual actions is not predicated upon an accommodation to union desires. If, as the majority suggest, a union may confer enforcement powers upon its members by the mere fact of passivity, contractual exclusivity provisions, and this Court's

rulings with respect to their import, will be rendered virtually meaningless. Except in cases of broad application or frequent recurrence, a union will have little incentive to prevent its members from asserting their complaints, whether meritorious or not.

Moreover, to require a union to oppose employee enforcement actions expressly and publicly, imposes upon the union an untenable burden to place itself in public political disagreement with its members. Indeed, union compliance with such requirement might compel a finding of bad faith toward the individual employees—a breach of the duty of fair representation—thus creating an individual right, under *Vaca, Maddox* and *Hines,* to enforce the contract. Further, the Seventh Circuit improperly shifted the burden of opposing intervention to the Union, rather than placing the burden upon the employees to allege and prove a breach by the Union of its duty of fair representation as a prerequisite to their individual action.

The majority below blithely overlook the distinct possibility—recognized by Judge Bauer in his dissenting opinion (Appendix A, at p. 26)—that the Union did not appeal the district court's judgment because it agreed with the determination and recognized that it was the district court, not the arbitrator, who correctly interpreted the contract.

More significantly, however, the employees have acted contrary to the Union's desires. Had the Union wished to proceed further, *it* would have appealed the district court's decision. Therefore, by definition, the employees' appeal is contrary to the Union's desires. In fact, as Judge Bauer cogently points out in his dissenting opinion (Appendix A at pp. 24-25), the present stance of the individual employees is squarely inconsistent with and violates the By-Laws of the Union to which they subscribed and by which they are bound.

The final basis of distinction by the majority—that the contract's exclusivity of enforcement provision does not extend beyond arbitration—is an even greater departure from prior law.[5] That court actions to vacate or confirm arbitration awards are part of the arbitration process is shown clearly by *Hines,* where this Court held that an employee may not maintain such an action absent proof of unfair representation by his union. To hold, as did the panel majority below, that *employee* actions to confirm arbitration awards are part of the arbitration process, and thus subject to the rule of *Vaca,* but that *employer* actions to vacate arbitration awards are not part of the arbitration process, and thus not subject to *Vaca,* is patently illogical. Indeed, the majority's decision confers greater rights upon nonparties to the collective bargaining agreement—individual employees—than it does upon a party to the contract—the employer.

Under the rule of *Vaca,* it makes no difference *when* the union chooses not to process a grievance further. Logically, no further substantive rights should be afforded employees seeking intervention simply because they do so *after* issuance of an award—one which ultimately may be held invalid and even may be void on its face. As the majority concede, individual employees lack standing to com-

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[5] The panel majority stated: "The fact that an employee could not demand arbitration under the contract does not determine whether he can intervene in an action brought by the employer in a court of law to vacate the award." (Appendix A, at p. 11).

[6] If the Union withdrew its demand to arbitrate the day before issuance of the award, the employees could not have pursued their grievances unless they alleged and proved that the Union breached its duty of fair representation. Yet, under the Seventh Circuit's holding, once the award is issued, proof of union unfair representation is no longer a prerequisite to the employees' usurpation of the union's authority.

pel arbitration under this agreement (Appendix A, at p. 9). The Union could have ceased processing the employees' grievances at any stage of the grievance procedure. It could have declined to arbitrate them or withdrawn from arbitration once commenced.[6] It could have declined to oppose the Company's action to vacate the award. Or in a different context, a union could itself bring an unsuccessful action to vacate an unfavorable arbitration award and then decide not to proceed further. In any of these situations, the union controls the proceedings and precludes individual action provided *only* that it does not breach its duty of fair representation. There is no logical reason why this case should be treated differently. The decision below critically undermines the rule of *Vaca;* it unwittingly creates a new concept which, if permitted to stand, will cause havoc in union-employer relationships.

A court action by a party to a labor agreement seeking a determination of the validity of an arbitration award rendered thereunder is not inconsistent with the arbitral process. Rather, it is merely an additional step in the resolution of the grievance—a step to which the parties to the agreement may proceed, but not individual employees, unless they allege and prove that their bargaining representative breached its duty of fair representation.[7]

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[7] It is the holding of the majority that intervention (without an allegation of a breach of duty of fair representation) depends upon who wins the arbitration. The consequences of that holding are illogical. For, assuming, *arguendo*, that an arbitrator exceeds his authority—as the Company contends is the case here—under the Seventh Circuit rationale, the mere issuance of such an invalid award would confer upon the individual employees a right to intervene which they had theretofore lacked. Such a void/voidable act, the validity of which is the subject of court action, should not confer new rights in that very action.

In sum, it is respectfully submitted that the Seventh Circuit decision herein, on the critical issue of standing and intervention, conflicts with the holding and rationale of the *Republic Steel-Vaca-Hines* line of decisions by this Court and the Fifth Circuit decision in *Acuff*, and, for that reason, should not be permitted to stand.

II

The Seventh Circuit's reversal of the district court's vacation of the arbitration award is in conflict with prior decisions of this Court and other circuits, and the question of an arbitrator's authority and the role of the courts in regard to arbitration decisions has not recently been addressed by this Court and is a subject of paramount importance which should be settled.

The Seventh Circuit majority's decision on the merits is premised upon their conclusion that Rule 10 appears in the section of the Company's rules pertaining to attendance, whereas another heading of the rules contains the language "causes for discharge pertaining to work." The majority conclude that since the rules pertaining to attendance do not specify that violations thereof are grounds for discharge, an ambiguity exists which permitted the arbitrator to ignore the clear contractual language of Article X. According to the majority, the arbitrator was permitted to resolve the ambiguity against the Company. The majority appear to agree, at least, that absent the finding of an ambiguity, the arbitrator would not be permitted the discretion afforded him by the panel in this case. Their decision, however, is in error and in conflict with the decision in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), where this Court stated:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The fact that one group of rules actually specifies in its heading the word "discharge" does not mean violation of rules in other groups does not warrant discharge. But that is not the issue. Even if the different headings of the rules created an ambiguity, the parties resolved that ambiguity clearly and succinctly when they bargained for and agreed upon Article X of the collective bargaining agreement, which provides that "violation of *any* Company rule shall be considered a just cause." (Appendix H, at p. 53).

Absent Article X, the Company could have discharged any or all of these employees for a good reason, a bad reason, or no reason at all (provided only that it did not violate any applicable statute prohibiting discrimination in employment). Thus, the employees' claims—and, indeed, any right of the Union to arbitrate their discharges—must of necessity emanate from the requirement in Article X that the Company only discharge employees for just cause. Their right not to be discharged except for just cause does not arise out of any of the Company rules; it exists solely because of Article X. It is clear from even a cursory reading of Article X that at least part of the *quid pro quo* for the Company's agreement to discharge only for just cause

is the very next sentence of Article X, which states that "[v]iolation of *any* Company rule shall be considered a just cause." (Appendix H, at p. 53).

Although the majority purport to base their reinstatement of the arbitrator's award on an alleged ambiguity in the collective bargaining agreement, the fact is that the arbitrator himself did not find any such ambiguity. Indeed, he found a violation of Rule 10 by each employee and imposed discipline for that violation. This factual finding is inconsistent with the panel majority's conclusion that an ambiguity exists.[8]

The employees' position below that an ambiguity existed was based upon the arbitrator's statement that Rule 10, itself, did not provide for absolute discharge. But, this is not a finding of an ambiguity. Regardless of how it is said, the arbitrator did not find any ambiguity. Rather, his reduction of the discharge penalty was based solely on his opinion that it was too harsh. Thus, he stated:

> "I find that the grievants did violate the Company's rule, but the nature of the violation, considering the circumstances set forth above [that although the employees did not call-in on a three-day basis as required, they each called at least once], does not justify discharge. In accordance with my findings, the grievants are found to be in violation of the Company's rule in varying degrees and, therefore, sub-

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[8] As found by the arbitrator, numerous employees have been discharged for violating Rule 10—a stark fact which conclusively belies any finding that Rule 10 violations do not subject employees to discharge. The arbitrator reaffirmed that the Company's practice was to discharge employees who failed to report for three days in violation of Rule 10. These facts are hardly consistent with any argument that violation of Rule 10 was not considered a dischargeable offense by the parties to the labor agreement.

> ject to varying penalty, but discharge is not the appropriate penalty in the instant case." (Appendix G, at p. 51).

Instead of basing his conclusion upon the record evidence or the common law of the shop, the arbitrator so concluded based solely upon his own perception of why employers establish such rules, without, however, any knowledge of why this Company established the rule in question. But, more significantly, the arbitrator arbitrarily chose to ignore—rather than interpret—the provision of Article X of the agreement which defines just cause for discharge as including *any* rule violation.

It is significant that those parts of the collective bargaining agreement relied on by the majority were never mentioned in the arbitration opinion and were omitted from the arbitrator's listing of "Pertinent Labor Agreement Provisions." The arbitrator listed only the rule which he found to have been violated, and Article X, which provides, clearly and unambiguously, that "violation of any Company rule shall be considered a just cause [for discharge]." (Appendix G, at pp. 43-44).

Under the parties' contract, the only question before the arbitrator was whether the employees violated a Company rule. The arbitrator found that each employee had violated Rule 10. Although he termed it, at one point in his opinion, a "technical violation," the arbitrator imposed substantial disciplinary suspensions, thereby making it clear, as pointed out by Judge Bauer (Appendix A, p. 25, n. 2), that he found that each employee had violated Rule 10. This finding, of course, must stand.[9]

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[9] Nor can it be said that the arbitrator construed the employees' violation of Rule 10 here as an exception to the Rule. If their conduct had been excepted from application of Rule 10, the arbitrator would not have found that they violated the Rule and, indeed, could not have imposed any discipline.

By concluding that the Company did not have just cause for these discharges, the arbitrator contravened the clear definition of just cause set forth in Article X of the contract; the Seventh Circuit compounded this erroneous result by tortuous reasoning to create an ambiguity even the arbitrator did not find, or even consider.

The majority opinion is, therefore, a drastic expansion of the permissible scope of arbitrators' powers, in manifest conflict with *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and *Mistletoe Express Service* v. *Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977). In *Mistletoe*, the Tenth Circuit vacated an arbitration award in which a rule violation had been found, but the contractual penalty for such reduced, stating:

> "The contract says that the acts, which the arbitrator found are just cause for discipline, are just cause for discharge. The arbitrator may not rewrite the labor contract." 566 F.2d at 695[10]

As recognized in Judge Bauer's dissenting opinion, the failure of the majority below to hold similarly constitutes a rewriting of the parties' collective bargaining agreement. To accept the majority position is to grant every labor arbitrator the power to determine in every case whether he considers the terms of a collective bargaining agreement to be reasonable or fair.

It is effectively to remove from unions and management the power to designate terms and conditions of employ-

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[10] *See also, International Brotherhood of Firemen & Oilers AFL-CIO, Local No. 935-B* v. *The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980).

ment and to place that power in the hands of arbitrators and the courts.[11]

Simply stated, the majority opinion in this case constitutes such significant erosion of this Court's definition of the permissible scope of arbitrators' powers and court review of arbitration awards so as to warrant review.

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[11] The question is not whether the Company, by its rules, intended to make an employee liable for "automatic discharge" in the event of a violation of each of its rules. Rather, the real question is whether the parties agreed that the Company cannot be held in violation of the just cause provision if it terminates an employee who breaches *any* Company rule. The parties agreed to afford the Company the discretion, if it chose to exercise it, to terminate employees for *any* rule violation. It is the contract which the Company is said to have violated; it is the contract which defines just cause as *any* rule violation; and it is the contract which must be applied here to determine whether a rule violation constitutes just cause for discharge. Article X probably was written to preclude an arbitrator from seizing upon language of a rule to satisfy his own perception of valid reasons for discharge. To permit an arbitrator to disregard the parties' clear intent, as specified in unambiguous contract language, violates this Court's admonition in *Enterprise Wheel, supra.*

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January 29, 1981

APPENDIX A

Opinion of the United States Court of Appeals

United States Court of Appeals

For the Seventh Circuit

No. 79-1839

F. W. WOOLWORTH CO.,

Plaintiff-Appellee,

v.

MISCELLANEOUS WAREHOUSEMEN'S UNION, LOCAL NO. 781, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant,

Appeal Of: GERALD FELL, CLIFFORD KENDRICKS and ERNEST TURNER,

Applicants for Intervention.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-289—**Edwin A. Robson**, *Judge*.

ARGUED APRIL 8, 1980—DECIDED AUGUST 7, 1980

Before SWYGERT, BAUER, and CUDAHY, *Circuit Judges*.

CUDAHY, *Circuit Judge*. This action arose from the decision of plaintiff, F. W. Woolworth Co. ("Woolworth"), to discharge three of its employees, Gerald Fell, Clifford Kendricks and Ernest Turner. Their discharge was the subject of an arbitration proceeding pursuant to the collective bargaining agreement between Woolworth and the Miscellaneous Warehousemen's Union, Local

No. 781, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union"), the labor organization which represented the discharged employees. The arbitrator ordered the reinstatement of Fell, Kendricks and Turner, so Woolworth brought this action in the district court under § 301 of the Labor Management Relations Act of 1947 ("LMRA"), as amended, 29 U.S.C. § 185, to vacate the arbitrator's award.

The Union appealed and argued in support of the arbitration award in the district court but Woolworth's motion for summary judgment was granted and the award was vacated. The Union did not seek appellate review of the district court's decision so the three employees moved to intervene and filed notice of the instant appeal. The employees did not claim that the Union had breached its duty of fair representation. The district court denied their motion to intervene, as well as Fell's separate motion for reconsideration of the district court's decision.

The issues presented by this appeal are (1) whether the employees may intervene in order to bring this appeal and (2) whether the district court properly vacated the arbitrator's decision. We find that the three individual employees had standing to intervene in order to bring this appeal. We also reverse the district court's order vacating the arbitration award.

Facts

Fell, Kendricks and Turner were employed by Woolworth at its Chicago, Illinois, distribution center where they were represented by the Union.[1] Fell had been employed by Woolworth since 1957, Turner since 1966 and Kendricks since 1975. All three employees were discharged in early 1978 for violation of Rule 10 of Woolworth's rules and regulations. Rule 10 states that

[1] These facts appear from the record of the arbitration proceeding and are undisputed, except as otherwise indicated.

> When an employee is absent from work, he shall notify the Company at the earliest possible time, giving reason for such absence, and keep the Company advised daily as to the probable date of return to work. Excessive absenteeism is cause for discharge.

The facts surrounding each discharge may be summarized as follows. On Tuesday, January 24, 1978, Fell telephoned Woolworth's personnel manager, Steve Knawa, and informed him that he (Fell) was ill and would not be coming to work. There is some dispute as to whether Fell told Knawa how long he would be absent. Thereafter, Fell did not call in and he was discharged when he reported for work on Monday, January 30, 1978.

Turner broke his hand on December 19, 1977, and was under a doctor's care with Woolworth's knowledge. Woolworth expected Turner to return to work on February 21, 1978, based upon a previously submitted medical report. When Turner did not return to work on February 21, and did not call in, he was discharged. On February 27, 1978, Turner returned to work and found out he had been discharged. That afternoon Turner submitted a second medical report indicating that he (Turner) would not be able to return to work until March 1, 1978.

Kendricks was on sick leave and was released by Woolworth's physician to return to regular duties on April 17, 1978. Kendricks called in on April 18 and stated that he was under another doctor's care and would bring in a note the next day. Kendricks returned to work on April 24, 1978, with a doctor's note dated April 20 indicating that Kendricks was still under the physician's care. Kendricks was under the impression that his doctor had called on April 19. The records indicated that the doctor did call but only inquired about insurance coverage.

Article X of the collective bargaining agreement between Woolworth and the Union provides that

> No employee shall be discharged except for just cause. Violation of any Company rule shall be considered a just cause. Any dispute with respect to justification for a discharge of any employee shall be considered a grievance and subject to the grievance and arbitration machinery provided in this agreement. The term "just cause" shall not be limited solely to violation of Company rules.

The issue presented for arbitration was whether Woolworth had "just cause" for discharging these employees. If the arbitrator determined that Woolworth did not have just cause, he was to order an appropriate remedy.

Although Rule 10 suggests that employees must call in daily when absent from work, the arbitrator found that in practice the requirement was to report every three days, and this finding was uncontested. The arbitrator also found that under certain conditions the three day rule had not been enforced, stating that

> As a matter of practice under this Rule, employees who are hospitalized, on Workmen's Compensation, injured in a car accident, on Jury Duty or on funeral leave are not required to call in every three days. Other extenuating circumstances, if they are clear and understandable, may also provide relief from the three days rule.

The arbitrator found that all of the grievants were guilty of a "technical violation" of Rule 10. However he found that, with respect to Rule 10, the "Rule itself does not . . . provide for absolute discharge . . . ." He further found that an employee who fails to report for three days is only "subject to discharge." He also noted that each grievant had a legitimate illness of which Woolworth was aware and that each had called in initially. The arbitrator found that in each case "there was some confusion as to the exact date on which the grievant was to return to work." He differentiated these cases from those in which an employee does not call in at all.

Reviewing all of the facts and evidence, the arbitrator concluded that the violation of Rule 10 was only "technical" and that the just cause standard for

discharge provided for in Article X had not been met. The arbitrator directed Woolworth to reinstate Fell, Kendricks and Turner with full backpay except for certain periods of time which would stand as suspensions without pay (30 days for Turner and 90 days for Fell and Kendricks).

Woolworth then brought this action in the district court to vacate the arbitration award and further brought a motion for summary judgment toward that end. The district court granted Woolworth's motion for summary judgment and vacated the arbitration award because it concluded that since there was a technical violation of Rule 10, Woolworth had the right to impose the penalty of discharge for violation of the Rule. The district court found that the arbitrator had exceeded his authority by ordering a lesser penalty of suspension for the employees' infraction of Rule 10.

Discussion

1. *Right to Intervene and Standing to Appeal*

When the Union did not file a notice of appeal from the district court's grant of summary judgment, Fell filed a motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure, reciting that the Union was not taking an appeal of the district court's order granting summary judgment and that without such an appeal Fell was foreclosed from challenging the district court's order setting aside the arbitration award. At the same time Fell filed a motion for reconsideration, in which he asserted that he was the real party in interest and that the arbitrator had not exceeded his authority. Subsequently, Turner and Kendricks filed their motion for intervention.

The district court denied the motions for intervention and for reconsideration, finding that the movants lacked standing, citing *Acuff v. United Paper Makers and Paper Workers, AFL-CIO*, 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969). Fell, Kendricks and Turner then filed their notice of appeal. The issue presented here is whether under federal substantive

labor law and under Rule 24 of the Federal Rules of Civil Procedure, employees have standing to intervene to prosecute an appeal from an order of the district court setting aside an arbitration award in their favor when their union, which has represented them up to that point, declines to take the appeal but does not object to the employees' attempt to intervene and prosecute the appeal.

A. *Federal Substantive Labor Law*

We agree with Woolworth's contention that principles of federal substantive labor law affect the right of Fell, Kendricks and Turner to intervene in an action concerning the collective bargaining agreement entered into by their Union and Woolworth. We shall discuss these labor law principles before we determine whether the requirements of Rule 24 have been met.

An individual employee may, with significant limitations, bring suit against his employer in federal district court under § 301(a) of the LMRA to resolve a dispute arising under the collective bargaining agreement between his union and his employer. *Smith v. Evening News Association*, 371 U.S. 195, 200 (1962). For example, an employee may maintain such a suit against his employer for wrongful discharge. *See Harrison v. Chrysler Corporation*, 558 F.2d 1273, 1276 (7th Cir. 1977). However an employee is not entirely free to bring such a suit if the collective bargaining agreement provides an exclusive procedure for the resolution of disputes arising under it.

Thus in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), the Supreme Court held that an employee could not sue his employer for breach of the collective bargaining agreement unless he had first attempted to utilize the grievance procedures established by the collective bargaining agreement. This approach is in accordance with Congressional policy as expressed in § 203(d) of the LMRA: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes

. . . ." 29 U.S.C. § 173(d). Requiring employees to use this grievance procedure is beneficial to the union because it allows the union to participate in the administration of the agreement on a continuing basis. It also benefits the employer because it limits the remedies available to an aggrieved employee. *Maddox, supra*, 379 U.S. at 653.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), an employee sued his employer for wrongful discharge in violation of the collective bargaining agreement after his union refused to submit his grievance to arbitration. The Supreme Court held that an employee's union had a duty to represent its members fairly in grievance proceedings conducted pursuant to the collective bargaining agreement, but an employee could not sue his employer under these circumstances unless he alleged that the union had violated its duty of fair representation by not submitting his claim to arbitration.[2] The Court in *Vaca* noted that the employee did not have an absolute right to have his grievance submitted to arbitration, and the union could, in the exercise of its sound discretion, supervise the grievance procedure and decide whether to seek arbitration of a particular dispute. 386 U.S. at 191. The Court stated that it was appropriate for the union to control the grievance procedure for several reasons:

(1) the union and the employer could attempt in good faith to settle most grievances short of arbitration without individual employees forcing them to arbitrate claims which the union and the employer did not find meritorious;

(2) similar grievances could be treated consistently;

(3) the cost of the grievance procedure would not be increased by the arbitration of frivolous claims. *Id.*

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[2] This principle has been applied in many cases, *e.g.*, *Cady v. Twin Rivers Towing Company*, 486 F.2d 1335 (3rd Cir. 1973); *Moore v. Sunbeam Corporation*, 459 F.2d 811 (7th Cir. 1972); *Lomax v. Armstrong Cork Company*, 433 F.2d 1277, 1280 (5th Cir. 1970).

Several courts have also held that an employee may not attempt to vacate an arbitration award unless the union has breached its duty of fair representation. For example, in *Acuff v. United Paper Makers and Paper Workers, AFL-CIO*, 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969), 63 employees had been discharged by the Scott Paper Company as a result of unauthorized work stoppages, and the union brought suit under § 301(a) of the LMRA to compel arbitration. After arbitration proceeded under stipulation between the company and the union, the arbitrator denied the grievances of 16 employees but ordered the reinstatement of the others. The employees whose grievances had been denied then filed a motion to intervene in the § 301(a) suit in an attempt to vacate the arbitration award. Their attempted intervention was opposed both by the company *and by the union*. The court said in denying the motion to intervene:

> The issue in this case is fundamental, yet simple. In order to effectuate the purposes of the labor statutes employees are empowered to organize. This, of course, has resulted in enormous benefits but entails certain burdens as well. One of these is that to some extent the interests of particular individuals are subordinated to the interests of the group both at the contract negotiation stage and thereafter. [Citing cases] This is necessary if a union is to function efficiently. As a result, a union may properly determine not to pursue a member's grievance to the arbitration stage at all. 'If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation.' *Vaca v. Sipes*, 386 U.S. 171, 191, 87 S.Ct. 903, 917, 17 L.Ed. 2d 842 (1967). It would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to assume

> full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned.
>
> This is not to say, however, that we would afford no relief even if a union in refusing to pursue a grievance or in its manner of advocacy were motivated by animus against an individual union member. But a 'breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.' *Vaca v. Sipes, supra* at 190, 87 S.Ct. at 916. Certainly this is not such a case. Nothing is alleged that plausibly suggests bad faith on the part of the union. The union pursued the grievance with energy and indeed, in large measure, with success. The employees cannot equate lack of complete success with bad faith any more than they could if their own lawyers had been involved. 404 F.2d at 171. [Footnote omitted].

Similarly, in *Andrus v. Convoy Company*, 480 F.2d 604 (9th Cir. 1973), *cert. denied*, 414 U.S. 989, several employees brought suit under § 301(a) to set aside an arbitration award but their action was dismissed because they did not allege that their union had breached its duty of fair representation. However if an employee alleges and proves that the union breached its duty it may attack the arbitration award. *Harrison v. Chrysler Corporation*, 558 F.2d 1273, 1276-77 (7th Cir. 1977) and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-64 (1976).

Thus under the system of collective bargaining mandated by the LMRA, the union (in contrast to the individual employees) is in control of the collective bargaining process and may, in the exercise of good faith and sound discretion, take employee grievances to various steps of the grievance procedure, including the ultimate step of arbitration, so long as it does not violate its statutory duty of fair representation. *Vaca v. Sipes, supra*. The grievance procedure as such reaches its culmination in the arbitration award. But in addition,

individual employees may not intervene in or maintain suits under the collective bargaining agreement to *set aside* arbitration awards reached in pursuance of the grievance procedure, *particularly in opposition to the union*, so long as the union has represented the employees fairly. *Acuff* and *Andrus*, both *supra*. These principles, and the policies underlying them, reflect the philosophy of collective bargaining incorporated in the LMRA and exemplify the fundamental policy of entrusting labor disputes and grievances to the good faith discretion of exclusive bargaining agents.

The instant case, however, involves neither attempted individual employee intervention in the grievance procedure nor efforts by individual employees to *set aside* the ultimate result of the grievance procedure, namely the arbitration award. Here we have a situation where the grievance procedure has culminated in an arbitration award, which Woolworth has sought to vacate through an action under § 301(a) of the LMRA. The Union has opposed Woolworth's efforts in the district court. The record is bereft of any evidence that, in failing to prosecute an appeal from the order of the district court setting aside the award, the Union is seeking to carry out any collective bargaining policy or strategy. In evincing no objection to the actions of the putative intervenors, the Union at the very least has indicated indifference to the pursuit of the appeal, as well as to the result reached on appeal (although we must presume that the Union would prefer its position in the district court to be vindicated on appeal).

Woolworth argues that the circumstances under which individual employees may enforce the collective bargaining agreement between their employer and their union are extremely limited, particularly where—as here—the collective bargaining agreement contains a contractual procedure for dispute resolution and delegates the power to invoke that procedure to the Union and Woolworth. While we agree that under *Vaca* an employee is "bound by the terms of that agreement which governs the manner in which contractual rights may be enforced," 386 U.S. at 184, we do not agree with

Woolworth's argument that these employees may not intervene in judicial proceedings concerning the arbitration award because they have no right under the contract to demand arbitration.

We are of this view because the contract in the instant case merely establishes a grievance procedure consisting of several informal steps culminating in the reference of the dispute to arbitration. Article XI, § 3 of the contract, respecting the ultimate resolution of disputes, provides that "[t]he decision of the Board of Arbitration shall be final and binding upon parties to this agreement, both of whom agree to expedite this arbitration and share expenses equally." Thus the grievance procedure as such culminates in the arbitration award and does not include suits brought under § 301(a) to vacate the award. The fact that an employee could not demand arbitration under the contract does not determine whether he can intervene in an action brought by the employer in a court of law to vacate the award.

Woolworth also argues from the cases discussed *supra*, that employees may not intervene in a suit brought under the circumstances of the instant case. We do not agree with Woolworth's interpretation of these cases, particularly *Acuff*. The decisional authority governing the rights of individual union members to participate in the process of dispute resolution after arbitration suggests that individual members may not bring suit in an attempt to have the award set aside. *See Andrus, supra*. Nor may they intervene in an ongoing action in order to vacate an award, particularly in opposition to the union. *See Acuff, supra*. However the instant case differs substantially from *Andrus* and *Acuff* in two respects: (1) the Union in the instant case does not oppose the intervention and (2) the employees wish to intervene in order to uphold the arbitration award. We believe that union opposition to the intervention together with the employees' attack on the award, which play no part in the instant case, essentially determined the result in *Andrus* and *Acuff*.

Since the circumstances of the instant case differ substantially from the facts of the cases discussed above,

it is necessary to weigh the equities favoring intervention by employees seeking to uphold the arbitration award against the policy favoring exclusivity of union representation. Fundamental fairness demands such a balancing process and the balance here tips decisively in favor of employee intervention.

The factors favoring intervention by the employees in the instant case are: (1) the employees are defending, not attacking, the arbitration award, which stands as the culmination of the contractual grievance procedure, (2) the Union has taken a position in the district court in defense of the award, (3) the Union has not objected to the employees' intervention or appeal and (4) in the absence of intervention these employees lose what may be their final day in court, resulting in a sharply focused perception of unfairness.

Weighing against these considerations are the following factors: (1) the Union will no longer be an active participant in the litigation, (2) conceivably the Union may have decided to cede the claims of these employees in an agreement with Woolworth foregoing an appeal in exchange for some other concession by Woolworth (although there is no record indication of this) and (3) the litigation will be prolonged, thus increasing the cost to Woolworth and to the judicial system. We conclude that these factors do not outweigh the reasons, noted above, for allowing intervention.[3]

The employees here are merely seeking the ultimate vindication of the arbitration process which the Union originally demanded and has consistently pursued and which Woolworth repudiated by seeking to have the arbitration award set aside. If there were even any colorable conflict between the individual employees and the Union as to whether an appeal ought to be taken or

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[3] We believe that the cited factors, pro and con, are significant in the context of the instant case, but we also note that each application for intervention must be evaluated in light of its unique facts and circumstances, which might entail the consideration of factors which are not significant in the instant case.

as to what stance ought to be taken on appeal, we assume that the Union might prevail in the balancing process which we have essayed. If there were indications that the Union agreed not to appeal in exchange for other consideration from Woolworth, intervention might be inappropriate or, conversely, questions of fair representation might conceivably arise. When, as here, the Union is merely passive at a late stage in the litigation, we ought reasonably to assume that no conflicts of policy are present.

Allowing the employees to intervene in order to prosecute the instant appeal does not conflict with any of the considerations of policy mentioned in *Vaca*, *Maddox* or *Acuff*. For example, allowing intervention does not increase the cost of the arbitration process by increasing the number of cases arbitrated or decrease the union's ability to decide which cases to submit to arbitration. Intervention also strengthens the grievance procedure by increasing the possibility that the arbitrator's decision will be upheld through review of a district court order vacating that decision. Further, the union's interest in supervising the administration of the agreement is not affected by allowing intervention at this point, and the union will save the cost of pursuing an appeal.

The issues presented in the instant case should be governed by flexible, pragmatic and, above all, just, procedural principles not by some suffocating rule that unions may, under any imaginable circumstances, be the only party opposing the employer in proceedings involving the construction of collective bargaining agreements.[4] Any argument that the contractual func-

[4] We note that a similar flexible approach was used by the Supreme Court in *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972). In *Trbovich* the Court allowed an individual to intervene in a suit brought by the Secretary of Labor under § 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. 482(b), after determining that his intervention would not contravene any of the policies of the LMRDA or unduly burden the Secretary or the union.

(Footnote continued on following page)

tion of the union in deciding which grievances should be pursued would be undermined by allowing these employees to take this appeal is quite specious. The function of the Union has been perfected by its winning of the arbitration (which it has subsequently supported). So long as the employees intervene in support of the award and without the opposition—formal or informal—of the Union, they are merely complementing the activities of the Union and seeking to vindicate the purposes for which the Union undertook their representation in the first place.

As the matter stands in the district court, not only the rights of the Union but also the specific rights of these employees, as crystallized in the arbitration award, have been defeated. After arbitration these employees have a specific vested interest in the award going beyond the Union's collective claim. Certainly absent any suggestion that there is some collective Union interest in refusing to take an appeal, the right to appeal, which these employees would have if they were named parties, is unfairly defeated by requiring the Union to pre-empt all representation at the appellate court level. An approach which denies these employees their ultimate day in court subverts justice in the name of meaningless abstractions disguised as substantive labor law. Under that dispensation, a union could appear as a dog in the manger, serving no meritorious end. In addition, excluding intervenors, such as these, might encourage an employer to depreciate employee rights in a seemingly sanctimonious concern for the niceties of collective bargaining.

Thus no considerations of policy are presented to defeat the strong equities and fundamental rights of the individual employees in seeking enforcement of the arbitration award, which was the culmination of the grievance procedure provided under the collective

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[4] *continued*
See also Brennan v. Silvergate District Lodge No. 50, International Association of Machinist and Aerospace Workers, AFL-CIO, 503 F.2d 800 (9th Cir. 1974).

bargaining agreement. We therefore conclude that these employees may, as a matter of federal substantive labor law, intervene in order to bring the instant appeal.

B. *Intervention under Rule 24*

Since we have determined that federal substantive labor law does not prevent Fell, Kendricks and Turner from intervening in order to prosecute this appeal, we must determine whether they have met the requirements of Fed. R. Civ. P. 24. Rule 24(a)(2) provides that upon timely application anyone shall be permitted to intervene in an action as of right:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

We conclude that these three employees are entitled to intervene as of right under Rule 24(a)(2).

Kendricks, Fell and Turner have a direct interest in the arbitration award which is the subject of the instant suit because the award ordered Woolworth to reinstate them. They also have an interest in a more formal sense because the arbitration proceeding is the last step in the grievance procedure established by the collective bargaining agreement. Employees have an interest in the collective bargaining agreement (and its grievance procedure) and may sue under § 301(a) to enforce this agreement (unless such a suit would be inappropriate for the reasons discussed in Part A, *supra*). Thus in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976), the Supreme Court stated:

> Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours,

overtime pay and *wrongful discharge*. *Smith v. Evening News Association*, *supra*, [371 U.S.] at 198, 200. [Emphasis supplied].

We therefore conclude that these employees have a sufficient interest in the arbitration award for purposes of Rule 24(a)(2).

The employees are so situated that the judgment of the district court and the Union's failure to appeal would, through application of the doctrine of *res adjudicata*, impair, impede or destroy their ability to protect their interests. Additionally, since the Union has withdrawn from the case, the interests of the employees would not be adequately represented by "existing parties."

The employees did not attempt to intervene until after the district court granted Woolworth's motion for summary judgment but their application for intervention was timely for two reasons. First, the employees presumably could not intervene until Woolworth's motion for summary judgment was granted and the Union decided not to appeal because of the principles of substantive labor law discussed in Part A, *supra*. Second, the employees were represented by the Union, an "existing party," until it decided not to appeal, so until that decision the employees could not intervene under Rule 24(a)(2). We note that in the context of class actions, this court has held that an application for intervention is timely if it is brought shortly after the class representative indicates that she will not appeal an order denying class status. *Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976), *aff'd sub nom., United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). In *Romasanta* we stated that timeliness is to be determined from all the circumstances of the case and that members of the class "may rely on the champion of the class until he or she abdicates. In this case we believe that abdication occurred when plaintiffs decided not to appeal the adverse class determination." 537 F.2d at 918-19. Having examined the circumstances of the instant case, we conclude that the employees' application for intervention was timely because, until the Union decided not to

appeal, the employees could not intervene under Rule 24(a)(2) or as a matter of federal labor law.[5]

We therefore find that the district court erred in denying the applications of Fell, Kendricks and Turner for intervention because they met the requirements of Rule 24(a)(2) and federal substantive labor law does not bar their intervention.

2. *Review of the Arbitration Award*

Having determined that the employees' applications for intervention should have been granted and that these appeals are properly before us, we reach the question whether the district court was correct when it granted Woolworth's motion for summary judgment and vacated the arbitration award. It is well established that the district court has a limited function when called upon to review an arbitration award.[6] The Supreme Court has emphasized that

> the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

See also Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 294-95 (7th Cir. 1975); *International Associa-*

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[5] On appeal Woolworth does not argue that the employees do not meet the requirements of Rule 24 but rather Woolworth contends that an *unsuccessful* applicant for intervention cannot bring an appeal on the merits. We do not reach this point because we conclude that Fell, Kendricks and Turner should have been allowed to intervene.

[6] *See United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tion of Machinists, District No. 8, AFL-CIO v. Campbell Soup Company, 406 F.2d 1223, 1226-27 (7th Cir. 1969); *Yellow Cab Company v. Democratic Organizing Committee, Local 777, S.I.A.N.U., AFL-CIO*, 398 F.2d 735, 737-38 (7th Cir. 1968).

Essentially, the district court set aside the arbitration award in this case because the arbitrator initially found that there was a "technical" violation of Rule 10 in that, with respect to each grievant, there was a three-day period during which he did not call in.[7] As the district court noted, Article X of the collective bargaining agreement states that the violation of "any rule" is just cause for discharge. The district court concluded that the Company could discharge employees for any violation of Rule 10 because the violation of "any rule" was just cause for discharge. The district court also stated that the arbitrator was without power to reduce the discharge penalty. We do not find this analysis by the district court compelling in the face of the heavy presumption supporting the arbitration award.

The issue presented for arbitration was whether Woolworth had "just cause" for discharging Fell, Kendricks and Turner. The arbitrator concluded that Woolworth did not have "just cause" even though Rule 10 had technically been violated and Article X provided that the violation of "any rule" constituted just cause. Apparently, the arbitrator refused to read Article X

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[7] The arbitrator found that, in effect, Rule 10 had been modified from an "every day" rule to a "three day" rule. The arbitrator said:

> While it is true that the Rule itself does not set out the three-day limitation which the Company imposes nor does it provide for an absolute discharge, the Company has as a matter of practice maintained that a person who fails to report for three days is subject to discharge and has apparently discharged a number of people. While the Rule is admittedly harsh, it is not unreasonable but it must be applied in consideration of all the facts in given instances and keeping in view the purpose of the requirement for individuals to call in when absent.

literally.[8] Thus the question presented by this appeal is whether the district court properly rejected the arbitrator's reasons for this interpretation of the contract.

Two interrelated reasons for the arbitrator's interpretation of the contract appear from the record. First, the contract provisions relating to discharge are ambiguous. Woolworth's rules, which appear in the appendix which follows this opinion, are divided into three sections with the following headings:

(1) RULES PERTAINING TO SAFETY, FIRE PREVENTION AND SANITATION (Rules 1-7),

(2) RULES PERTAINING TO ATTENDANCE (Rules 8-10) and

(3) CAUSES FOR DISCHARGE PERTAINING TO WORK (Rules 11-22).

Rule 19 specifically provides that violation of the first seven rules, which relate to safety, fire prevention and sanitation would be cause for discharge, so the "RULES PERTAINING TO ATTENDANCE" (including Rule 10) are the only rules which do not appear, on the face of things, to be cause for discharge. Rule 10 itself states that *excessive absenteeism* would be cause for discharge, but does not specify a penalty for failing to notify Woolworth of an absence. Thus there is some question whether violation of "any rule" would, as Article X states, be cause for discharge, or whether only the violation of Rules 1-7 and 11-22 (and "excessive absenteeism") would be cause for discharge, as the rules themselves appear to provide. This ambiguity appears from the face of these provisions and demands interpretation.

Second, there were several reasons for interpreting the contract in a way which resolved the ambiguity against Woolworth. The arbitrator noted that in the instant case, each grievant had notified Woolworth of his

[8] We question whether on its face such a sweepingly broad statement of principle could rationally be read with entire literalness.

initial absence and there was some confusion as to when each one was to return to work. The arbitrator examined the body of industrial law and concluded that when an employer is aware of an employee's initial absence, "it must be assumed that the employee has not abandoned his job and therefore the Company is bound to investigate the matter more fully and to be more lenient in its application of a strict rule such as the one involved herein." These considerations led the arbitrator to conclude that in light of the nature of the employees' violation of Rule 10, Woolworth did not have just cause to discharge them.

The district court rejected the arbitrator's interpretation of these somewhat contradictory provisions because it felt the arbitrator should have read Article X literally. However, this court has stated that review of an arbitration award is limited to two narrow questions: (1) whether the award "draws its essence from the collective bargaining agreement" and (2) whether "the arbitrator's words manifest an infidelity to this obligation." *Amoco Oil Company v. Oil, Chemical and Atomic Workers International Union, Local 7-1, Inc.*, 548 F.2d 1288, 1293-94 (7th Cir. 1977), *cert. denied*, 431 U.S. 905. In applying this standard we noted that

> [a]n arbitrator's award does 'draw its essence from the collective bargaining agreement' so long as the interpretation can in some rational manner be derived from the agreement, 'viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.' [Citations omitted]. Neither the correctness of the arbitrator's conclusion nor the propriety of his reasoning is relevant to a reviewing court, so long as his award complies with the aforementioned standards to be applied by the reviewing court in exercising its limited function. *Id.* at 1294.

We conclude that the arbitration award in the instant case "drew its essence" from the parties' agreement,

viewed in the light of its language, the surrounding circumstances and the "law of the shop." The provisions at issue were somewhat contradictory so it was appropriate for the arbitrator to interpret them and resolve the ambiguity. His interpretation was rational so it should not have been rejected by the district court.

We also agree with the arbitrator's position that the reduction of the penalty from discharge to suspension did not modify an established practice. Rather it was another way of stating the arbitrator's apparent conclusion that no consistent and binding practice of discharging employees pursuant to Rule 10 in circumstances of the kind present in the instant case existed. The arbitrator had the power to reduce the discharges to suspensions because, if he found that Woolworth did not have just cause for the discharges, he was required to "order a remedy."

We therefore conclude that the district court erred in granting summary judgment for Woolworth and in vacating the arbitration award. That the district court, or this court, could easily reach conclusions different from those of the arbitrator as to the meaning of Rule 10, as to the proper interpretation of Article X or as to a substitute remedy is not germane. Woolworth and the Union did not agree upon either the district court or us as the final arbiter of their disputes. But they both agreed upon the arbitrator to have the last word. His decision is not irrational and must stand.

REVERSED.

APPENDIX

F.W. WOOLWORTH CO.
CHICAGO DISTRIBUTION CENTER

RULES PERTAINING TO SAFETY, FIRE PREVENTION AND SANITATION

1. All safety rules, regulations, and instructions must be observed and obeyed.
2. All accidents shall be reported immediately.
3. Any employee having knowledge of, or being witness to, an accident shall—if requested—give full and truthful testimony as to same.
4. All fire prevention and sanitary rules, regulations, and instructions must be observed and obeyed.
5. No smoking, except in washrooms during the period specified, nor creating of other fire hazards in the premises.
6. All refuse and waste to be placed in containers provided for the purpose.
7. All work places, aisles, passageways, rest rooms and lavatories to be kept in clean and sanitary condition.

RULES PERTAINING TO ATTENDANCE

8. All employees must be in their assigned places and ready for work at the designated starting time.
9. All employees shall remain at their respective places of work during working hours and shall not visit other parts of the premises except in the line of duty.
10. When an employee is absent from work, he shall notify the Company at the earliest possible time, giving reason for such absence, and keep Company advised daily as to the probable date of return to work. Excessive absenteeism is cause for discharge.

CAUSES OF DISCHARGE PERTAINING TO WORK

11. Inability or unwillingness to perform work as required or directed.

12. Neglect of duty, including neglect, misuse and wastage of Company material, property, tools or equipment, or wilful damage to or failure to properly safeguard and protect Company property.
13. Reporting for duty under the influence of liquor, or carrying into the plant or consuming intoxicating liquors on Company premises.
14. Disorderly conduct, or participation in fights or brawls on Company property.
15. Dishonesty or theft, including deliberate destruction, damage or removal of Company, or other employee's property.
16. The use and inclusion in or on any carton, case, package, or marking, symbol, sign or design of whatever description or form, not authorized by the Company.
17. Giving false information as to previous record and experience, or otherwise falsifying personal record or application statements.
18. Marking, defacing, damaging, writing or drawing, on or upon any walls, doors, or windows of Company property or facilities.
19. Disregard of, or inattention to, working directions and instructions, or refusal to comply with, or violation of, safety or fire regulations or sanitary rules and regulations.
20. The regular packages or boxes of merchandise shall not be opened, nor any of the contents removed therefrom, except by foreman or by employees directly authorized or instructed by foreman or the Management to do so, and then only in line with the work assigned to them. Packages or boxes of merchandise shall not be removed from their regular place, or sections, to other parts of the premises by any employee, for any purpose except in the regular performance of their duties, unless directly authorized or instructed to do so by foreman or the Management, and then only in line with the work assigned to them.
21. Falsification, or wilful destruction, of work records, or for not processing orders as scheduled or directed.

22. Reporting for duty under the influence, or carrying into the plant, or consuming or using on Company premises, or inducing or causing others to use any drugs, narcotics, stimulants, depressants or hallucinogens (unless prescribed by the employee's physician and taken only in accordance with the physician's prescription and instruction); or giving, selling or delivering such items to any other person on Company premises; or trafficking for the sale or delivery of such items while on Company premises. This rule refers but is not limited to amphetamines ("speed" "Pep pills"), barbituates [*sic*] ("Goof Balls"), tranquilizers, LSD-type drugs, and marijuana, grass or pot in any form.

BAUER, *Circuit Judge*, dissenting. I dissent.

The majority opinion seems to me to be doing precisely what the arbitrator did that was wrong: it rewrites the collective bargaining agreement.

To begin with, the question of standing is resolved by this Court in saying that "an approach which denies these employees their ultimate day in court subverts justice in the name of meaningless abstractions disguised as substantive labor law." This too is a "meaningless abstraction."

The fact is, "these employees" joined a union which had as one of its by-laws the following:

(B) Every member by virtue of his membership in this Local Union authorizes this Local Union to act as his exclusive bargaining representative with full and exclusive power to execute agreements with his employer governing terms and conditions of employment *and to act for him and have final authority in presenting, processing and adjusting any grievance, difficulty or dispute*

> *arising under any collective bargaining agreement or out of his employment with such employer, in such manner as the Local Union or its officers deem to be in the best interests of the Local Union.* The Local Union and its officers, business representatives and agents may decline to process any such grievance, complaint, difficulty or dispute, if in their sole discretion and judgment, such grievance, complaint or dispute lacks merit. (Emphasis added.)[1]

When the Union entered into the collective bargaining agreement with the company, it negotiated the terms of employment and the "just cause for firing" agreement. By terms of this contract, binding on the Union and the company, a violation of any company rule was *per se* a just cause for discharge. The contract called for arbitration of "any dispute with respect to the justification for a discharge."

With this in mind, it is obvious that the sole question before the arbitrator was whether "just cause" existed for the action of the company in firing the appealling employees. The arbitrator did just that: he reached the conclusion that there had been a violation of the company rules.[2]

Having made this finding, the purpose and scope of the hearing was over. The violation had occurred, the collective bargaining agreement by its terms had set

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[1] Excerpt from By-laws of Miscellaneous Warehousemen's Union, Local No. 781, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America annexed to Affidavit of Robert F. Sharp, Esq., dated July 9, 1979.

[2] The finding was that the employees were guilty of a "technical violation" of the rules. Boiled down, that is a violation of the rules. It is somewhat similar to a medical diagnosis of being "technically pregnant"—it means that the patient had better prepare for labor pains, or perhaps "technical labor pains."

forth a violation as just cause for discharge and the case was over.

Nevertheless, the arbitration award went further: it rewrote the employment contract. The arbitrator decided, as nearly as one can tell, that *he* would not have been that harsh, that he would not have exercised his right to discharge these three employees but would have fashioned a lesser penalty. And so he did.

The trouble, of course, is that he was not a party to the employment contract and he was not the party to fashion the penalty for the infraction of the company rules that he himself had found existed. That decision, that problem, was uniquely the right and burden of the company. It could, and did, insist on firing the employees. This decision was *not* the subject of arbitration; the right to make the decision *was* the subject of arbitration and that issue was resolved in favor of the company.

When the trial judge ruled that arbitrators are not free to rewrite conditions of employment or causes for discharge in labor contracts, and still less are they free to fashion their own ideas of reasonable punishment in place of contractual rights to impose particular sanctions, the court was not engaged in "a seemingly sanctimonious concern for the niceties of collective bargaining." The court was, in my opinion, engaged in an intelligent application of contract and labor law.

It is fascinating to note that the Union, who acted on behalf of the complaining employees, secured them their day in court and found no quarrel with the decision of the district court. It might be that the Union, like the company, might consider that observing the "niceties of collective bargaining" is precisely what unions bargain for, insist upon and ultimately rely upon to protect the covered employee. The fact that such an approach also gives the company certain rights merely means that any contract is a two-way street—both parties have contractual rights.

Just as the arbitrator had no authority to rewrite the contract, we also lack such authority. That fact was recognized by the district court. I would affirm.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Memorandum and Order of the United States District Court dated June 7, 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 289

F. W. WOOLWORTH CO.,

Plaintiff,

v.

MISCELLANEOUS WAREHOUSEMEN'S UNION, LOCAL NO. 781, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, a labor organization,

Defendant.

This cause is before the court on crossmotions for summary judgment. For the reasons hereinafter stated, the plaintiff's motion shall be granted, and defendant's motion shall be denied.

The plaintiff F. W. Woolworth Co. [hereinafter Woolworth] brings this action to vacate an arbitration award involving discharge of three Woolworth employees. Jurisdiction is invoked pursuant to Section 301 of the Labor

Management Relations Act, as amended, 29 U.S.C. § 185 and 28 U.S.C. § 1331, and is undisputed.

The defendant Miscellaneous Warehousemen's Union Local No. 781 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [hereinafter Union] answered the complaint by counterclaiming for affirmance of the arbitrator's award and requesting attorney's fees. Briefs have been submitted in support, in opposition and in reply to the crossmotions.

Woolworth operates a distribution center in Chicago, Illinois, at which the Union represents Woolworth's warehouse employees in accordance with a collective bargaining agreement that has been in effect at all times relevant to this action. The agreement provides:

> Article X. Discharge
>
> No employee shall be discharged except for just cause. Violation of any Company rule shall be considered a just cause. Any dispute with respect to justification for a discharge shall be considered a grievance and subject to the grievance and arbitration machinery provided in this agreement. The term 'just cause' shall not be limited solely to violation of Company rules.

Company Rule 10, in effect at all relevant times, states "[w]hen an employee is absent from work, he shall notify the Company at the earliest possible time giving reason for such absence and keep the Company advised daily as to the probable date of return to work. Excessive absenteeism is cause for discharge." It is undisputed that Company Rule 10 has been in existence for a number of years and that, in practice, the requirement of reporting in daily

on the probable date of return to work has been relaxed to the extent that discharge occurs following failure to call in within three days of the employee's absence.

During the months of January, 1978, through April 1978, Woolworth discharged three employees, Gerald Fell, Ernest Turner and Clifford Kendricks, for violation of Company Rule 10. Each employee filed grievances which were discussed at three separate meetings between Woolworth's management and the Union. The grievances were considered together at an arbitration hearing conducted by Arbitrator Albert Epstein on September 20, 1978. In an award dated December 2, 1978, the arbitrator found that "the grievants in this case are all guilty of a technical violation of Rule 10." Award at 7. The arbitrator further stated:

> While it is true that the Rule itself does not set out the three day limitation which the Company imposes nor does it provide for absolute discharge, the Company has as a matter of practice maintained that a person who fails to report for three days is subject to discharge and has apparently discharged a number of people. While the Rule is admittedly harsh, it is not unreasonable but it must be applied in consideration of all of the facts in given instances and keeping in view the purpose of the requirement for individuals to call in when absent.

The arbitrator rejected Woolworth's contention that his reduction of the discharge penalty would, in effect, modify an established practice. His award stated that the Company "did not have just cause for the discharge of [the] employees . . . under the terms of the Labor Agreement between the parties." His award reduced the penalty im-

posed to disciplinary suspension of varying lengths, ordered reinstatement and ordered reimbursement for loss of earnings, incurred between the end of the suspension period and the reinstatement date less any compensation received by the employees in the interim.

Woolworth contends that the arbitration award must be vacated since the award is contrary to the explicit terms of the collective bargaining agreement and since the arbitrator exceeded the scope of his authority in making his award. The Union contends that this court may not interfere with the arbitrator's award and seeks an award of attorney's fees against Woolworth for bringing this action.

It is well-established that judicial review of arbitration awards is exceedingly limited. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 584, 581-82 (1960). This court may not substitute its own judgment for that of the arbitrator on the merits of the grievance. *Cannon* v. *Consolidated Freightways Corp.*, 524 F.2d 290, 295 (7th Cir. 1975); *Durabond Products, Inc.* v. *United Steelworkers of America*, 421 F. Supp. 76, 78 (N.D. Ill. 1976) (Robson, S.J.). Nonetheless, an inquiry is proper to determine whether the arbitrator exceeded his contractual authority by substituting his own brand of industrial justice in contravention of the express terms of the agreement of the parties. *See Mistletoe Express Service* v. *Motor Expressman's Union*, 566 F.2d 692, 694-95 (10th Cir. 1977), and authorities cited therein.

In this action, Article X sets forth a limitation on any arbitrator's authority. The provision includes a partial definition of "just cause" for discharge expressly stating that violation of any Company Rule is just cause. Article X further provides for submission of disputes concerning

discharges to grievance arbitration. The significance of this provision is that it grants the arbitrator the authority to determine what constitutes a violation of a Company Rule and what constitutes "just cause" for discharge in cases other than those involving violations of Company Rules. The provision also has the effect of permitting Woolworth to impose the discharge penalty for violation of a Company Rule if the arbitrator finds a violation of a Company Rule, thereby limiting an arbitrator's authority to modify the penalty. Here, the arbitrator found a technical rule violation. It is therefore clear that under the terms of the contract between the parties, the arbitrator exceeded his authority by ordering a lesser penalty of suspension for the employee's infraction of Company Rule 10. Once the arbitrator found that Company Rule 10 had been violated, he was not permitted to dispense his own industrial justice, in contravention of the express terms of the contract. *Mistletoe Express Service* v. *Motor Expressmen's Union, supra* at 695; *Litvak Packing Co.* v. *Amalgamated Butcher Workmen, Local 641, AFL-CIO,* 455 F. Supp. 1180, 1182 (D. Colo. 1978); *Durabond Products, Inc.* v. *United Steelworkers of America, supra.*

Contrary to defendant's contention, the court may not ignore the arbitrator's conclusion that there was a "technical" violation of the Rule 10, on the ground that this ruling was not consistent with the record or the arbitrator's findings. Such an examination of the merits of the award is precisely the type of inquiry that is foreclosed to the court. *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 596 (1960); *Amoco Oil Co.* v. *Oil Chemical and Atomic Workers International Union, Local 7-1,* 548 F.2d 1288 (7th Cir. 1977). Therefore, the court concludes that the arbitrator exceeded his authority in modifying the penalty discharge of the employees.

Appendix B

For the reasons stated, it is therefore ordered that the plaintiff F. W. Woolworth Co.'s motion for summary judgment shall be, and the same is hereby, granted. The defendant Miscellaneous Warehousemen's Union, Local 781, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America's motion for summary judgment shall be, and the same is hereby, denied. The court directs the plaintiff to submit an appropriate judgment order within ten days of this order.

EDWIN A. ROBSON
Senior Judge

June 7, 1979.

APPENDIX C

Order of the United States District Court dated June 18, 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION DOCKET NO. 79C-289

F. W. WOOLWORTH CO.,

Plaintiff,

v.

MISCELLANEOUS WAREHOUSEMEN'S UNION, LOCAL NO. 781, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, a labor organization,

Defendant.

This cause having come before the Court on cross-motions for summary judgment filed by plaintiff and defendant, it appearing to the Court that no genuine issue exists as to any material fact, the Court having read and considered the briefs and affidavits filed herein, and this Court having issued, on June 7, 1979, a Memorandum and Order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment, and for the reasons set forth in the aforesaid Mem-

orandum and Order issued on June 7, 1979; it is hereby Ordered that:

The arbitrator, having found in his Opinion dated December 2, 1978 that Company Rule 10 was violated by each of the grievants, exceeded his authority under the applicable collective bargaining agreement by modifying the discharge penalty of employees Gerald Fell, Ernest Turner and Clifford Kendricks to suspensions; and, therefore,

a. Judgment is hereby entered granting plaintiff's motion for summary judgment and vacating the arbitrator's finding that plaintiff did not have just cause for the discharge of employees Gerald Fell, Ernest Turner and Clifford Kendricks under the terms of the Labor Agreement between the parties and vacating the direction in said award that plaintiff reinstate said employees to their former jobs and reimburse them for loss of earnings; and

b. Judgment is hereby entered denying defendant's Motion for summary judgment.

Robert F. Sharp
Williams, Manos, Rutstein,
Goldfarb & Sharp, Ltd.
72 West Adams Street
Chicago, Illinois 60603
(312) 236-2084 / (312) 263-1100

Francis X. Dee
Carpenter, Bennett & Morrissey
744 Broad Street
Newark, New Jersey 07102
(201) 622-7711

Enter:

HONORABLE EDWIN A. ROBSON
Senior Judge

Date: June 18, 1979

APPENDIX D

Order of the United States District Court dated July 13, 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 289

F. W. WOOLWORTH CO.,

Plaintiff,

v.

MISCELLANEOUS WAREHOUSEMEN'S UNION, LOCAL NO. 781, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, a labor organization,

Defendant.

This cause is before the court on motion of Gerald Fell, Clifford Kendricks and Ernest Turner to intervene and to seek reconsideration of this court's order of June 18, 1979. The court finds that the movants lack the requisite standing to intervene and seek reconsideration of this court's order. *Acuff* v. *United Paper Makers and Paper Workers, AFL-CIO,* 404 F.2d 169 (5th Cir. 1968). Accordingly the motion to intervene and for reconsideration will be denied.

Appendix D

HARVEY A. NATHAN
Suite 1407
100 North LaSalle Street
Chicago, Illinois
(312) 782-0198

Enter:

EDWIN A. ROBSON
Senior Judge

Date: July 13, 1979

APPENDIX E

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 7, 1980

Before

HON. LUTHER M. SWYGERT, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge

F.W. WOOLWORTH, CO.,

Plaintiff-Appellee,

No. 79-1839 vs.

MISCELLANEOUS WAREHOUSEMEN'S UNION, LOCAL NO. 781, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 79-C-289

JUDGE EDWIN A. ROBSON

Appendix E

Appeal of: GERALD FELL, CLIFFORD KENDRICKS and ERNEST TURNER,

Applicants for Intervention.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this court filed this date.

APPENDIX F

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 31, 1980

Before

HON. THOMAS E. FAIRCHILD, Chief Judge
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILBUR F. PELL, JR., Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge

F.W. WOOLWORTH, CO.,

Plaintiff-Appellee,

No. 79-1839 vs.

MISCELLANEOUS WAREHOUSEMEN'S UNION, LOCAL NO. 781, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant.

Appendix F

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 79-C-289
EDWIN A. ROBSON, JUDGE

Appeal of: GERALD FELL, CLIFFORD KENDRICKS and ERNEST TURNER,

Applicants for Intervention.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled matter by counsel for plaintiff-appellee, a vote of the active members of the court was requested, and less than a majority of the active members of the court have voted to grant a rehearing *en banc.** A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

---

* Circuit Judges Pell, Sprecher, Bauer and Wood voted to grant petition for rehearing *en banc*.

APPENDIX G

Arbitration Award dated December 2, 1978

AMERICAN ARBITRATION ASSOCIATION
Case No. 51 30 0471 78

ALBERT A. EPSTEIN
Arbitrator

In the Matter of the Arbitration

Between

F. W. WOOLWORTH COMPANY

And

LOCAL 781, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

GRIEVANCES OF GERALD FELL, ERNEST TURNER AND CLIFFORD KENDRICKS

THE PROCEEDINGS

The above parties, unable to resolve the above grievances, submitted the matter to the undersigned for arbitration under the terms of their Labor Agreement. The Board of

Appendix G

Arbitration required under the terms of the said agreement was waived by the parties who stipulated that the undersigned should act as sole arbitrator.

A hearing on the matter was held on September 20, 1978 at the offices of the American Arbitration Association, 180 North LaSalle Street, Chicago, Illinois. Both parties were represented and fully heard, testimony and evidence were received, a transcript of the proceedings was taken and both parties filed post-hearing briefs.

APPEARANCES

FOR THE UNION:

Mr. Donald W. Cohen	Attorney
Mr. Robert Bernstein	Business Representative
Mr. Robert O'Brian	Business Representative

FOR THE COMPANY:

Mr. Christopher J. Hoey	Director of Employee Relations

THE ISSUE

Did the Company have just cause for the discharge of employees, Gerald Fell, Ernest Turner and Clifford Kendricks under the terms of the Labor Agreement between the parties. If not, what shall the remedy be?

PERTINENT LABOR AGREEMENT PROVISIONS

"ARTICLE X

DISCHARGE

"No employee shall be discharged except for just cause. Violation of any Company rule shall be con-

sidered a just cause. Any dispute with respect to justification for a discharge of any employee shall be considered a grievance and subject to the grievance and arbitration machinery provided in this agreement. The term 'just cause' shall not be limited solely to violation of Company rules."

PERTINENT COMPANY RULES

"RULES PERTAINING TO ATTENDANCE

"10. When an employee is absent from work, he shall notify the Company at the earliest possible time, giving reason for such absence, and keep Company advised daily as to the probable date of return to work. Excessive absenteeism is cause for discharge."

DISCUSSION AND OPINION

Company Rule 10 has been in existence for over twenty years. On its face it requires that employees who are absent are to call the Distribution Center daily. In practice the parties have established a three day limit, i.e., an employee must call in within three days of his absence or he will be discharged. As a matter of practice under this Rule, employees who are hospitalized, on Workmen's Compensation, injured in a car accident, on Jury Duty or on funeral leave are not required to call in every three days. Other extenuating circumstances, if they are clear and understandable, may also provide relief from the three days rule. The Company submitted evidence indicating that a number of employees have been discharged for violation of Rule 10.

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Grievant Gerald Fell has a Seniority date of January 10, 1957. On January 24, 1978, Fell telephoned Personnel Manager Steve Knawa and informed him he was sick and would not be in that day. Fell testified that at the time he told Knawa he would be out a few days. Knawa testified that the grievant did not inform him as to the length of his absence. The Company notes the grievant did not state that he would be out a few days at the grievance review and in the written grievance report. Therefore, when the grievant reported to work on January 30, 1978, he was advised of his termination.

Grievant Ernest Turner had been employed by the Company since 1966. Turner broke his hand on December 19, 1977 and did not return to work until February 27, 1978, when he learned that he had been terminated. The termination by the Company was predicated upon a medical report submitted by the grievant's doctor indicating that the grievant would be able to return to work on Tuesday, February 21, 1978. This form (Co. Ex. 11) placed no limitations upon the grievant's release. The grievant acknowledged he was aware of the date of release included on the form. Upon learning of his termination, Turner returned to work later that day with a slip from his doctor stating that the grievant would be able to report for work on March 1, 1978. (The Company notes this transaction occurred after the grievant had been informed of his termination.)

Christopher J. Hoey, Director of Employee Relations, testified that he wrote the doctor a letter pointing out that he had earlier released the grievant for work as of February 21, 1978. Approximately one month later he received a letter from the doctor indicating that his earlier release was for "light duty". It is stipulated there is no light duty available to the grievant.

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Grievant Clifford Kendricks had a Seniority date of October, 1975. Kendricks had also been on sick leave prior to his discharge. He had been released by the company doctor to return to light duty on April 10, 1978. At that time he was informed by Knawa there was no light duty and he should return on April 17, 1978, the date the doctor indicated he could resume full duties. (The grievant's birthday was on that date and pursuant to the contract it was a holiday for him.) Kendricks called in on April 18 and stated he was under another doctor's care and would bring in a note the next day. The grievant did not come in to work until April 24, 1978. At this time he was in possession of a note dated April 20, 1978, from his personal doctor indicating he was unable to work until that date. At that time the grievant was informed he had been terminated for failing to report within three working shifts of his scheduled date for return to work.

The grievant maintained that a doctor did call the Company on his behalf on April 19, 1978. The record indicates that the grievant's doctor's office called in to verify insurance coverage but did not specify the reason for the inquiry.

The Union questions the motive of the Company for the discharges of grievants Fell and Kendricks. It alleges that Fell was terminated as an "example" and because the Company felt the Hispanic and black employees would have felt he received favorable treatment because he was white. Grievant Turner charged that the Company's discharge was in retaliation for litigation filed by him against the Company alleging racial discrimination. Due to the failure of the parties to submit evidence regarding these charges, I would find the issues to be not relevant to the determination of the case.

Appendix G

It is the initial position of the Company that it has established the existence and enforcement of the rule requiring notification of absences. It notes the evidence indicating the practice of termination after three days absence without notification has been in existence for a period of over twenty-five years. It submits that this practice may be changed only through bargaining, and not through arbitration.

The Company acknowledges the rigidity of the rule. It states that while such a rule is harsh, it is also very necessary because absenteeism and the failure to timely report one's absence imposes a burden on both the Company and fellow employees.

The Company maintains it had just cause for the discharge of Gerald Fell. It states the record clearly indicates the grievant was aware of the rule. It calls attention to the fact that when he had been ill in the past he had followed the practice of notifying the Company.

It is the position of the Company that grievant Turner clearly violated the rule and was discharged. The Company notes the evidence indicating the grievant was aware of the fact that the original memorandum indicated he was to return to work on February 21, 1978. It calls attention to the fact that only after the grievant was informed of his discharge did he produce an additional note from the doctor indicating he could not return to work until February 28, 1978. The Company argues that regardless of whether he could have physically returned to work on February 21, 1978, he was obligated to notify the Company of the extension of his required absence. Therefore, the Company submits it had just cause for discharging Turner.

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It is the position of the Company that it clearly had just cause to discharge Clifford Kendricks. It notes the record is clear that the grievant did not call in to notify the Company of his extended absence. While the Company denies that the grievant's doctor called in on April 19, 1978, it notes that by the Union's own evidence the only purpose of that telephone call was to verify the grievant's insurance coverage.

The Company contends that the Arbitrator must uphold the finding of violations of the rule as well as the imposition of discharges. It submits it has established an existing practice of discharging an employee for violation of this rule. Therefore, it submits that any reduction in the penalty imposed would be a modification of the past practices which existed between the parties.

It is the primary position of the Union that discharge is too severe a penalty under the facts in the instant cases. The Union, in its brief, cites a considerable number of prior awards which held that where the Company had been aware of a grievant's absence, the failure to comply with a three day notice requirement does not justify discharge.

The Union points out that each of the three grievants is a long-term employee who had an undisputed physically disability of which the Company had been informed. It maintains the imposition of discharge was totally unwarranted under the circumstances.

The Union argues that one of the premises upon which the rule involved is invoked is that the employer may consider the employee to have abandoned his or her job. It maintains that in each instance the Company was aware of the reason for absence and could not have reasonably

concluded that the individual intended to abandon his job. On this point, the Union also cites arbitral authority in support of its position.

The Union concludes by asserting that the Company has followed a harsh, arbitrary procedure which has not been reduced to writing or acknowledged by the parties as binding. Therefore, it submits that the Arbitrator should find the Company did not have just cause for the discharge of the grievants.

I find that the grievants in this case are all guilty of a technical violation of Rule 10. While it is true that the Rule itself does not set out the three day limitation which the Company imposes nor does it provide for absolute discharge, the Company has as a matter of practice maintained that a person who fails to report for three days is subject to discharge and has apparently discharged a number of people. While the Rule is admittedly harsh, it is not unreasonable but it must be applied in consideration of all of the facts in given instances and keeping in view the purpose of the requirement for individuals to call in when absent.

In the instant cases, all of the grievants had notified the Company of their initial absence, so that the Company was aware that there was an illness involved which formed the basis for the grievant's initial absence. I agree with the Union that this type of situation must be differentiated from that where an employee simply stays away from work because he is ill or because he has some other valid reason and does not notify the Company at all. In the latter case, the matter is much more serious because the Company has no indication that the employee is going to be absent and the effect upon its assignment of personnel

and its production is obviously much more serious. In cases such as the grievants in this matter are involved with, the employees are charged with failing to continue to report their absence for three days periods. In each of the cases involved herein, there was some confusion as to the exact date on which the grievant was to return to work. This is especially true in the case of grievant Turner who was relying upon a specific statement from his doctor indicating when he was to return to work albeit that this was a supplemental statement to which the Company objects. In any event, however, none of these cases involved the example set forth above where the Company has no initial knowledge of the employee's absence from work.

Many arbitration cases hold that where the Company does not have any information whatsoever which would indicate the reason for an employee's absence, discharge under a rule which the Company applies here, is justified. An equal number of cases, however, hold that where the Company does have information of an initial absence, it must be assumed that the employee has not abandoned his job and therefore the Company is bound to investigate the matter more fully and to be more lenient in its application of a strict rule such as the one involved herein. If an employee gives no notice whatsoever, it is fair for the Company to assume that it need only wait a specified period of time such as the three days involved herein and that it may then logically take the position that the grievant has in fact abandoned his job. That is not the situation in the instant cases.

The difference between an employee who does not call at all and one who fails to supplement his original notification to the Company must be taken into consideration

when judging the propriety of the penalty of discharge. I find no support for the Company's position that a reduction of penalty is in effect a modification of an established practice in the instant case. I find that the grievants did violate the Company's rule, but the nature of the violation, considering the circumstances set forth above, does not justify discharge. In accordance with my findings, the grievants are found to be in violation of the Company's rule in varying degrees and, therefore, subject to a varying penalty, but discharge is not the appropriate penalty in the instant case.

In the case of grievant Turner, the penalty should be minimal because he was in effect relying upon a doctor's certificate which indicated that he was to return to work at a later date than that indicated in a previous report from the doctor, upon which the Company relied. In the cases of grievants Fell and Kendricks, I find that a greater penalty should be imposed because they had no basis for any specific delay but in each of their cases, the Company had notification of their original absences.

An Award will therefore issue reducing the discharges of the grievants to the disciplinary suspensions set forth in the Award below.

AWARD

1. The Company did not have just cause for the discharge of employees Gerald Fell, Ernest Turner and Clifford Kendricks under the terms of the Labor Agreement between the parties.
2. The Company is directed to reinstate the employees to their former jobs on the first day of the full work

week immediately following the date of receipt of this Award by the Company.

3. The discharge of Ernest Turner is reduced to a 30 day disciplinary suspension, and the Company is directed to reimburse him for any loss of earnings which he may have incurred after the 30 day suspension period.

4. The discharge of Gerald Fell and Clifford Kendricks are reduced to a 90 day disciplinary suspension, and the Company is directed to reimburse them for any loss of earnings which they may have incurred after the 90 day suspension period.

5. In all cases, the Company may deduct any compensation earned by the grievants during the period following the date of their discharges from their back pay allowances.

Albert A. Epstein
Arbitrator

CHICAGO, ILLINOIS
DECEMBER 2, 1978

APPENDIX H

Excerpted Collective Bargaining Agreement Between F. W. Woolworth Co. and Miscellaneous Warehousemen's Union, Local 781, IBT

ARTICLE X—DISCHARGE

No employee shall be discharged except for just cause. Violation of any Company rule shall be considered a just cause. Any dispute with respect to justification for a discharge of any employee shall be considered a grievance and subject to the grievance and arbitration machinery provided in this agreement. The term "just cause" shall not be limited solely to violation of Company rules.

ARTICLE XI—GRIEVANCE PROCEDURE AND ARBITRATION

Section 1. Any dispute arising out of or under the provisions of this agreement shall be disposed of in the following manner:

(a) The party who believes there is a grievance shall bring this to the attention of the steward within five (5) working days of the occurrence of the alleged grievance. The steward shall then present the grievance to the manager of the Distribution Center within three (3) additional working days in an effort to settle same.

(b) If the grievance is not satisfactorily adjusted in this manner in 48 hours, the grievance shall be reduced to writing and the matter shall be discussed further between the manager of the Distribution Center and a grievance committee of not more than three. The disposition of any grievance discussed under paragraph (b) shall be reduced to writing.

(c) If settlement cannot be thus satisfactorily arranged within three (3) days, an authorized representative of the

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Union and an authorized representative of the management shall be called in to sit with the group indicated in paragraph (b).

Section 2. In the event that the Company has a grievance which it desires to call to the attention of the Union, it shall submit same by addressing a communication in writing to the Union office.

Section 3. In the event that satisfactory adjustment is not made of the grievance raised under Sections 1 or 2 above, the matter shall be referred to a Board of Arbitration of three members, one of whom shall be chosen by the Company, one by the Union, and the third arbitrator and Chairman to be designated by the American Arbitration Association, and in that event, the arbitration shall be conducted according to the rules of that Association. The decision of the Board of Arbitration shall be final and binding upon the parties to this agreement, both of whom agree to expedite this arbitration and share expenses equally.

Section 4. By mutual agreement the progressive steps of the grievance procedure may be short cut.

Section 5. The Union agrees that it will not conduct or cause to be conducted or permit its members to engage in a strike, stoppage or slowdown of any kind during the term of this agreement, nor will the Company lock out its employees during the term of this agreement, but will resort to the machinery herein provided for to settle any problem which may arise.

Section 6. The renewal or extension of this agreement shall not be handled through the grievance machinery or arbitration provided herein.

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